United States Court of Appeals for the Second Circuit



APPENDIX

76-6111

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff- Appellant

VS.

UNITED STATES OF AMERICA

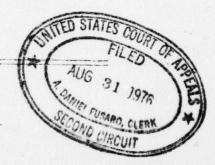
Defendant-Appellee

CIVIL APPEAL FROM UNITED STATES DISTRICT COURT FOR WESTERN DISTRICT OF NEW YORK

APPENDIX
TO BRIEF FOR PLAINTIFF-APPELLANT

MAGAVERN, MAGAVERN, LOWE, BEILLEWECH & DOPKINS
Attorneys for Plaintiff-Appellant
20 Cathedral Park
Buffalo, New York 14202

Of Counsel: SAMUEL D. MAGAVERN CHARLES B. DRAPER



PAGINATION AS IN ORIGINAL COPY

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IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL D. MAGAVERN, As Executor and Trustee of the Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

APPENDIX
To Brief for Plaintiff-Appellant

SUMMARY OF DOCKET ENTRIES

The Complaint was filed August
23, 1974. The Answer and Counterclaim by the
defendant was filed October 25, 1974. Plaintiff's Reply was filed on January 6, 1975.
On March 12, 1975, the Plaintiff filed a
Motion for Summary Judgment under Rule 56
F.R.C.P. On May 7, 1975, Plaintiff filed the
Surrogate's Court Decision, a Memorandum of
Law, a Supplemental Memorandum of Law, an
Amended Supplemental Memorandum of Law and a
Reply Brief. On May 16, 1975, Defendant filed
its Crossmotion for Partial Summary Judgment.
On June 2, 1975, Plaintiff filed a Reply

Memorandum of Law. On June 11, 1975, Defendant, by letter, advised the Federal Court that a Transcript of the proceedings in the Surrogate's Court was unavailable. By letter dated June 19, 1975, Plaintiff advised the Federal Court of the nature of the proceedings in the Surrogate's Court, and attached to said letter a letter, dated September 9, 1974, by Surrogate Regan to the Defendant. On June 8, 1976, the Federal District Court (John T. Curtin, D.J.) filed its Decision and Order, denying Plaintiff's Motion for Summary Judgment and granting Defendant's Crossmotion for Partial Summary Judgment declaring the tax lien valid and deferring for trial the determination of the actual amount of money reached by the levy.

By Stipulation filed on July 15, 1976, the parties agreed that the amount of money reached by the Defendant's Levy is \$2,305.50, which sum represents a calculation of the average amounts which the debtor received from the trust between 1968 and 1973, as reflected by Estate Ledger. On July 15, 1976, Plaintiff filed the Federal Court's Amended Order and Final Judgment based upon said

Stipulation.

On July 15, 1976, Plaintiff filed an Order (John T. Curtin, D.J.), granting Plaintiff leave to file an Amended Notice of Appeal, the original of which was filed on July 6, 1976. On July 15, 1976, Plaintiff filed an Amended Notice of Appeal.

WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff,

COMPLAINT

-vs-

UNITED STATES OF AMERICA.

Defendant.

Plaintiff, Samuel D. Magavern, as Executor and Trustee of the Last Will and Testament of Margaret C. Duncan, deceased, by his attorneys, Magavern, Magavern, Lowe & Beilewech, for his complaint herein, alleges:

FIRST: That jurisdiction of this claim is conferred by Title 26, §7426(a)(1) of the United States Code (26 U.S.C.A. §7426(a)(1).

SECOND: That plaintiff, in his representative capacity as above set forth, is the duly qualified and acting Executor and Trustee nominated in the Last Will and Testament of Margaret C. Duncan, the above-named decedent, Letters Testamentary and Letters of Trusteeship having been duly issued on the 2nd day of December, 1965, by the Surrogate's Court of Erie County.

THIRD: That Margaret C. Duncan, the above-named decedent, died on the 1st day of November, 1965, domiciled at 74 Tennyson Avenue, in the City of Buffalo, County of Erie and State of New York, leaving a Last Will and Testament, a copy of which is attached hereto and made a part hereof and labelled Exhibit "A", which was thereafter and on the 2nd day of December, 1965 duly admitted to probate by the Sucrogata's Court of Erie Count

FOURTH: That by said Last Will and Testament, after directing that all her debts, funeral expenses and inheritance taxes be paid, testatrix gave all the rest of her property, real, personal and mixed, to her trustee, in trust, to be held and administered for the benefit of the family group consisting of those from time to time living of her husband, Matthew Duncan, her son, Thomas W. Doran, his children and the issue of his children, with the provision that "My Trustee shall pay over or use, apply and expend whatever part or all of the net income or principal (even to the point of exhaustion thereof) or both, ther of he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group", and with the further provision that "My Trustee shall not feel bound in making such payments, uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group."

FIFTH: That on or about the 5th day of December, 1973, defendant United States of America, acting through it agents, Commissioner of Internal Revenue and District Director of Internal Revenue, Buffalo District, erroneously and wrongfully served upon the plaintiff, in his representative capacity as above set forth, a Notice of Levy, a copy of which is attached hereto and made a part hereof and labeled Exhibit "B", purporting to levy against all property, rights to property, moneys, credits and bank deposits now in plaintiff's possesion and belonging to Thomas W. Doran, and all sums of money or other obligations owing by plaintiff as Executor and Trustee of said testatrix, to Thomas W. Doran.

SIXTH: That plaintiff denies the validity of said
Notice of Levy and its affect upon the Estate of Margaret C.

Duncan in that, under the terms of said testamentary trust,
there is, at this time, neither property, rights to property,
moneys, credits or bank deposits now in plaintiff's possession,
belonging to the beneficiary Thomas W. Doran, nor sums of money
or other obligations owing by plaintiff to Thomas W. Doran, upon
which the federal tax liens can attach.

SEVENTH: That by reason of the foregoing, defendant's levy upon the above referenced trust estate was erroneous and wrongful.

EIGHTH: That by reason of the foregoing, plaintiff's rights in the above referenced trust property are superior to the rights of the United States and its agents.

NINTH: That a levy or sale would irreparably injure plaintiff's rights in said property.

WHEREFORE, the premises considered, plaintiff prays the Court for the following relief:

- 1. That defendant be restrained and enjoined permanently from enforcing such levy.
 - 2. That said Notice of Levy be cancelled.
- 3. That plaintiff have such other and further relief as to the Court is just and reasonable.

MAGAVERN, MAGAVERN, LOWE & BEILEWECH Attorneys for Plaintiff Office & P. O. Address 900 Prudential Building Buffalo, New York 14202 Telephone: (716) 856-3500

SAUVEL D. MAGAYERI, As : Executor and Trustee of The : Last Will and Testament of : MIPRAKET C. DUNGAH, Deceased,:

Plaintiff,

V.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. CIV 74-805
ANSWER AND COUNTERCLAIM

Defendant, United States of America, by its attorney,

John T. Elfvin, United States Attorney for the Western District

of New York, for its Answer to the Complaint herein, says

as follows:

FIRST: Defendant admits the allegations of Paragraph FIRST.

----X

SECOND: Defendant denies the allegations of Paragraph FIFTH, except insofar as it alleges service of a notice of levy, and Paragraphs SIXTH, SEVENTH, EIGHTH and NINTH.

THIRD: Defendant is without sufficient knowledge to either admit or deny the allegations of Paragraphs SECOND; THIRD and FOURTH.

Further answering the Complaint, the United States of America affirmatively alleges as follows:

FOURTH: A delegate of the Secretary of the Treasury made assessments for unpaid federal income, withholding and FICA taxes, penalties and interest against Thomas W. Doran, gave nouties of assessments and made demands for payment of same as follows:

Dalamose due a/o 11/1/7/!	45 L 82.93	4,804.40	6.801.57	245.77	1,441.82	48,357.67	6. 6. 6. 6.	\$ 108,303.76(7)	
Amounts Assossed	\$ 4,673.70(T) 297.45(T) 191.76(4)	(T) T) 1/00, 6 (T) 27.57 (T) (3) 57.18	9,304.90(T) 36.98(T) 163.55(5)	3,706.05(F) 36.30(I) 7.00(5) 15.79(6)	1,283.01(T)	43,476.19(7)	40,321.69(T)	\$ 112,753.51	Inc.
Dates of Assessments, Notices & Demands	10/2/72	5/19/67	4/5/70	1//31/71	12/1/72		12/1/72	TOTALS	McVey Service Corp. Buffalo Consolidated Cartage, Industrial Truck Lines, Inc.
Type Tax	Income	Income	Inconc	Income	Withholding & FICA (1)	Withholding & FICA (2)	Withholding % PicA (3)		ns 6671(b), 6672, ns 6671(b), 6672, ns 6671(b), 6672,
Tax	1965	996°T	1,079	02.51	late & 2nd qtr. 1965	2nd 9tr. 1967 thru 4th 9tr. 1968	146 Qer. 1965 thru 4th Atr.		(1) Code Sections (2) Code Sections (3) Code Sections

٠.

Code Section 6651(a), Late Code Section 665%, Maillare to hor Forthated Tax Penalty . . . Code Section 5551(a), Pailure to Pay Tax Penalty Plus interest according to Law, at 113.42 per dien after 11/1/74, and lien filing fees. Тах азвествей Interest assessed FIFTH: Although notices of the assessments and demands for payment have been made, the textaver, Thomas W. Doran, has refused and neglected to pay and there remains due and owing to the United States of America, the sum of \$108,303.96, plus interest according to law. SIXTH: As a result of the assessments described in Paragraph FOURTH above, liens in favor of the United States of America arose as of the dates of said assessments on all property and rights to property belonging to the taxpayer, Thomas W. Doran, pursuant to Section 6321 of the Internal Revenue Code of 1954. And further, the United States of America, for its counterclaim against the plaintiff, states: SEVENTH: By virtue of the federal tax liens recited above, the United States of America claims liens upon all property and rights to property of the taxpayer, Thomas W. Doran, including all property in the possession of the plaintiff in his fiduciary capacities, in which said taxpayer has any interest. WHEREFORE, the United States of America prays: a. That this Court find, determine and adjudge that the United States has valid and subsisting liens in the amount of the unpaid tax liabilities of Thomas W. Doran upon all property and rights to property of Thomas W. Joran, including liens upon the interest of Thomas W. Doran in the property in the pessession of the plaintiff herein in his fiductary capacities.

b. That this Court order that the tax
lien claims of the United States of America be
foreclosed against the interest of Thomas W.

Doran is the property held by the plaintiff
herein in his fiduciary capacities and that
the plaintiff be ordered to pay over to the
United States of America all money and property
due to Thomas W. Doran by virtue of his
interest therein.

c. That the relief sought by the plaintiff be denied.

d. That the United States of America be granted its costs and such other and further relief as this Court deems proper.

JOHN T. ELFVIN United States Attorney

By:

ROGER P. WILLIAMS
Assistant United States Attorney
502 U.S. Court House
Buffalo, New York 14202
(716) 842-3484

WILLIAM R. MORROW, JR. Trial Attorney, Tax Division U.S. Department of Justice Washington, D. C. 20530 (202) 739-3335

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing Answer and Counterclaim of the United States of America, was served upon the plaintiff by mailing a copy thereof by first class mail postage prepaid to Magavern, Magavern, Lowe & Beilewech, Attorneys for Plaintiff, 900 Prudential Building, Buffalo, New York 14202, this 21st day of October, 1974.

WILLIAM R. MORROW, JR.
Trial Attorney, Tax Division
U.S. Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased

Plaintiff

CIVIL ACTION NO. 74-405

-vs-

UNITED STATES OF AMERICA

REPLY

Defendant

Plaintiff, Samuel D. Magavern, as
Executor and Trustee of the Last Will and
Testament of Margaret C. Duncan, deceased, by his
attorneys, Magavern, Magavern, Lowe & Beilewech,
for his reply to the counterclaim contained in the
answer of defendant, UNITED STATES OF AMERICA,
states:

1. Denies the trust of the allegations contained in Paragraph "SEVENTH" of defendant's answer and counterclaim that claim the existence of any property in the possession of the plaintiff in his fiduciary capacities in which taxpayer, Thomas W. Doran has any interest.

AS A DEFENSE, PLAINTIFF ALLEGES:

2. Under the terms of said testamentary trust, there is, this time, neither property, rights to property, monies, credits or bank deposits now in plaintiff's possession, belonging to the beneficiary, Thomas W. Doran, nor sums of money or other obligations owing by plaintiff

to Taomas W. Doran, upon which federal tax liens can attach.

United States of American, dismissing the counterclaim with costs, and further demands judgment as demanded in the complaint.

MAGAVERN, MAGAVERN, LOWE & BEILEWECH Attornays for Plaintiff Office and P.O. Address 20 Cathedral Park Buffalo, New York 14202 (716) 855-3500

TO: JOHN T. ELPVIN
United States Attorney
Roger P. Williams
Assistant United States Attorney
502 U.S. Court House
Buffalo, New York 14202
(716) 842-3484

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, as Executor and Trustee of the Last Will and Testament of MARGARET C. DUNCAN, Deceased

Plaintiff

CIVIL ACTION NO. CIV. 74-405

MOTICE OF MOTION

-V5-

UNITED STATES OF AMERICA

Defendant

TO: RICHARD J. ARCARA
United States Attorney
502 U.S. Court House
Buffalo, New York 14202

PLEASE TAKE NOTICE, that the plaintiff, by his attorneys,
Magavern, Magavern, Lowe & Beilewech, will bring the annexed motion on for
hearing before this Court at Part I. United States Court House in the City
of Buffalo, New York on the 17th day of March, 1975, at 11:00 o'clock in
the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: Buffalo, New York
March 10, 1975

Yours, etc.,

MACAVERN, MAGAVERN, LOWE & BEILEWECH

Attorneys for Plainties

Office and P.O. Address

20 Cathedral Park

Buffalo, Haw York 14202 Telephone: (716) 853-3500

JPHEM/ch

UNITED STATES DIFFERENCE COURT WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, as Executor and Trustee of the Last Will and Tostament of MARGARET C. DUNCAH, Deceased

CIVIL ACTION NO. CIV. 74-405

Plaintiff

-VS-

MOTION FOR SUMMARY JUDGMENT

UNITED STATES OF AMERICAN.

Defendant

Plaintiff moves this Court as follows:

Upon the affidavits of Samuel D. Magavern, sworn to on
the 1996 day of March, 1975 and upon the certified copy of the Order of
the Surrogate's Court of Erie County, dated January 27, 1975, adjudging
there is no property or rights to property belonging to Thomas W. Doran
in the trust created in Article Third of the Last Will and Testament of
Margaret C. Duncan, that the Court enter, pursuant to Rule 56 of the
Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor
for the relief demanded in the complaint, vacating, cancelling and
nullifying defendant's Notice of Lovy served on the plaintiff, Samuel D.
Magavern, as Executor and Trustee of the Last Will and Testament of
Margaret C. Duncan, deceased and dismissing the defendant's answer and
counter claim on the ground that there is no genuine issue as to any
material facts and that plaintiff is entitled to a judgment as a matter

of law, and for such other and further relief as may be just in the premises.

Dated: Buffalo, New York March 4, 1975

Yours, etc.,

MAGAVERN, MAGAVERN, LOWE & BEILEMECH

Attorneys for Plaintiff

Office and P.O. Address 20 Cathedral Park

Buffalo, New York 14202 Telephone: (716) 856-3500

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, as Executor and Trustee of the Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

-VS-

UNITED STATES OF AMERICA,

Defendant

STATE OF NEW YORK COUNTY OF ERKE SS.: CITY OF BUFFALO

SAMUEL D. MAGAVERY, being duly sworn, deposes and says:

- 1. That, at all times hereinafter mentioned, he was and still is the duly qualified and acting Executor and Trustee in the Last Will and Testament of Margarat C. Duncan, the above named decedent, Lett Testamentary and Letters of Trusteeship having been duly issued on the 2 day of December, 1965 by the Surrogate's Court of Erie County.
- 2. That he has personal knowledge of the matters hereinafter referred to, and makes this affidavit in support of plaintiff's motion for summary judgment.
- 3. That on or about the 5th day of December, 1973, defendant, acting through its agents, Commissioner of Enternal Revenue and District Director of Internal Revenue, Buffalo District, served upon

deponent, in his representative capacity as above set forth, a Notice of Levy, purporting to levy against all property, rights to property, monie credits and bank deposits now in plaintiff's possession and belonging to Thomas W. Doran and all sums of money or other obligations owing by plaintiff as Executor and Trustee of said Testetrix to Thomas W. Doran.

- 4. That on or about the 27th day of June, 1974, deponent commenced a proceeding in the Surrogate's Court of Erie County seeking a construction of Article Third of the Last Will and Testament of Margaret C. Duncan, which sets up a trust for the benefit of her family, for a determination of the interest, if any, of the beneficiary, Thomas W. Dor and a determination of the validity and enforceability of the defendant' claim against the Estate of Margaret C. Duncan.
- 5. That on or about the 28th day of June, 1974, defendant through its agent, Department of the Treasury Internal Revenue Service was served with notice of said proceeding and thereafter, on or about the 24th day of July, 1974, defendant appeared in said proceeding through it authorized agent, Roger P. Williams, an Assistant United States Attorney employed in the office of the United States Attorney in and for the Western District of New York.
- 6. That after various hearings and extensive presentation and exchange of briefs by the petitioner and the defendant through its authorized agent, Roger P. Williams, before the Surrogate's Court of Eric County, the Hon. William J. Regan took jurisdiction of the request for the

construction of Article Third of the Last Will and Testament of Margaret C. Duncan and for the determination of the property rights, if any, of the beneficiary, Thomas W. Doran in said Trust.

- 7. That this action, seeking to restrain and permanently enjoin the defendant from enforcing such levy and to have said Notice of Levy cancelled, was commenced on the 23rd day of August, 1974 to protect and preserve plaintiff's remedy under 26 U.S.C.A. §7426Al against the Statute of Limitations.
- 8. That defendant, by its attorney, John T. Elfvin, Unite States Attorney for the Western District of New York, appeared in this action on October 23, 1974 and served an answer by which it denied generally the allegations of plaintiff's complaint and set forth a counter claim to which plaintiff served its reply.
- 9. That after various hearings and the exchange and filing of briefs by your petitioner and the defendant in Surrogate's Court of Erie County, and on or about the 27th day of January, 1975, the Surrogate's Court of Erie County ordered, adjudged and decread that "the is no property or rights to property belonging to beneficiary, specifica Thomas W. Doran, the subject of this levy." A certified copy of the Surrogate's Court order dated January 27, 1975, is attached hereto and made a part hereof and marked Exhibit "A".
- 10. That, based on said order of the Surrogate's Court of Eric County, deponent believes that there is no genuine issue of any

material fact and that the cause of action is established sufficiently warrant the Court, as a matter of law, to direct judgment in favor of plaintiff, to dismiss the defendant's answer and counter claim, to vaca cancel and nullify defendant's Notice of Levy, and to grant such other and further relief as to the Court may seem just and proper.

Sworn to before me this

12 day of March, 1975.

Notary Public

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, as Executor and Trustee of the Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

-V3-

UNITED STATES OF AMERICA,

Defendant

STATE OF NEW YORK)
COUNTY OF ERIE SS.:
CITY OF BUTFALO)

SAMUEL D. MAGAVERY, being duly sworn, deposes and says:

- 1. That he has personal knowledge of the matters hereinafter referred to, and makes this affidavit to supplement his foregoing affidavit.
- 2. That Thomas W. Doran died on the 19th day of February 1975 in the City of Buffalo, County of Erie and State of New York.

Samuel D. Magavern

Sworn to before me this /2 Eday of March. 1975.

Motary Public

CHARLES & DRAPA MINA, POPUL, STATISMENTELLE CONTROL A CRU CONTY,

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MAGAVERN, MINTEN EN LOWER REHARION AND YORK THOMPS AND AND YORK THOMPS

At a Surrogate's Court held in and for the County of Erie, State of New York, at the County Hall, in the City of Buffalo, New York, on the 27 day of Jan., 1975.

PRESENT: HON. WILLIAM J. REGAN, Surrogate

SURROGATE'S COURT

COUNTY OF ERIE : STATE OF NEW YORK

N THE MATTER OF THE PETITION

of

SAMUEL D. MAGAVERN, Executor and Trustee of the LAST WILL AND TESTAMENT

File No. D 6044

of

MARGARET C. DUNCAN,

Deceased

This matter having come up before the Court on a petition of Samuel D. Magavern, Executor and Trustee of the Last Will and Testament of Margaret C. Duncan, to determine the construction and effect of certain provisions of said Last Will and Testament and the validity and effect, if any, of a Notice of Levy served upon him in his fiduciary capacity as trustee, purporting to attach all property. rights to property, moneys, credits and bank deposits in the petitioner's possession and belonging to Thomas W. Doran, one of the beneficiaries of the trust, and there appearing on behalf of petitioner, Magavern, Magavern, Lowe & Beilewech, Messrs. Samuel D. Magavern and Charles B. Draper, of counsel and John T. Elfvin,

U. S. Attorney, Roger B. Williams, Esq., of counsel, for the United States Government and upon hearing the arguments of counsel and examining into memorandum and the law in such cases made and provided, it is

ORDERED, ADJUDGED and DECREED, that this Court maintains jurisdiction over the Last Will and Testament of the deceased, Margaret C. Duncan and the construction and effect of any provisions of said Last Will and Testament, and it is further

ORDERED, ADJUDGED and DECREED, that the trust beneficiaries of the Estate of Margaret C. uncan, do not have any property rights in the trust which was created in Article Third of said Last Will and Testament which reads as follows:

"ARTICLE THIRD: 1. This trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the new income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound, in making such payments, uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group."

and it is further

ORDERED, ADJUDGED and DECREED, that, therefore, there is no property or rights to property belonging to beneficiaries, specifically

Chopse W. Doran, the subject of this love, and it is further

ORDERED, ADJUDGED and DECKERD, that Magavern, Magavern,

House a Beilewock, as attorneys for patitioner, be allowed the sum of \$ 3.500 %, for their services rendered herein.

Jan Surrogate

ENTER:

STATE OF NEW YORK COUNTY OF ERIE SURROGATE'S OFFICE

SS.: I, Joseph A. Scime, Chief Clerk of the Surrogate's Court, of the said County of Erie, do hereby certify that I have compared

the foregoing and annexed copy of:

ORDER in the estate of:

MARGARET C. DUNCAN, deceased.

with the original record there f now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said

Surrogate's Court, at Buffalo, N. Y., this 27th day of January , 195

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Joseph Line

80 Misc.24 32

In re WILL of Margaret C. DUNCAN, Deceased.

Petition of Samuel D. MAGAVERN, Executor and Trustee of the Last Will and Testament of Margaret C. Duncan, Deceased.

Surrogate's Court, Erie County. Dec. 27, 1974.

A testamentary trustee petitioned the court to determine the validity and effect, if any, of a notice of levy served upon him in his fiduciary capacity and purporting to attach property in his possession belonging to one of the beneficiaries of the trust. The Surrogate's Court, Erie County, William J. Regan, S., held that it did not have the authority or jurisdiction to vacate, annul, cancel or discharge the levy and that, the beneficiaries' interest in the trust being subject to the trustee's discretion, the beneficiary had no absolute right to receive income or principal from the trust and there was no property or rights to property subject to levy.

Order accordingly.

1. United States = 131

United States, in filing proof of claim in probate proceeding, implicitly consents to jurisdiction of probate court to determine validity of its claim.

2. Executors and Administrators ⇔259

Affirmative act of filing proof of claim invokes jurisdiction of Surrogate's Court to direct distribution of estate assets in accordance therewith.

3. Internal Revenue = 1781

Levy served under provisions of Internal Revenue Code after conclusion of probate proceedings effected administrative seizure of assets, and no authority of any court was necessary to give weight or legitimacy to its effect. 26 U.S.C.A. (I.R.C.1954) § 7426(a).

4. Courts \$\infty 489(13)

Surrogate's Court did not have authority enjurisdiction to vacate, annul, cancel or discharge levy served under Internal Revenue Code upon testamentary trustee, purporting to attach interests of beneficiary of testamentary trust in trustee's hands. 26 U.S.C.A. (IRC. 1954) § 7426(a); EPTL 7-2.1(a).

5. Trusts == 140(1)

Nature of beneficiery's interest in property subject to trust is equitable interest only, with right to enforce trust provisions parsuant to its terms.

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6. Trusts ⇔276, 280

Where trustee in administering trust is given absolute discretion as to application of income or principal to one or more of group of beneficiaries without being bound to observe any rule or precept of equality, beneficiaries have no absolute right to receive income from trust, their gift being only of so much as trustee shall properly determine to apply.

7. Trusts == 151(1)

Creditor of beneficiary of discretionary trust cannot compel trustee to pay any part of income or principal to beneficiary.

8. Wills \$\infty 684.10(1)

Where, under terms of testamentary trust instrument, beneficiaries were collectively designated as family group and trustee had complete and sole discretion to apply and expend income or principal for support of any one or all of members of group and was authorized not to observe any rule or precept of equality as between members thereof, interest of beneficiary under trust was merely one of expectancy, trustee could not be compelled to transfer to any member of group any part of trust property, and trustee held no property of beneficiary which was subject of levy until such time as trustee would exercise discretion to make payment from trust to beneficiary. 26 U.S.C.A. (I.R.C.1954) § 7426(a); EPTL 7-2.1(a).

Samuel D. Magavern, Buffalo, for petitioner.

John T. Elfvin, U. S. Atty., Roger P. Williams, Buffalo, of counsel, for the United States.

WILLIAM J. REGAN, Surrogate.

The trustee of the Last Will and Testament of Margaret C. Duncan has petitioned this court to determine the validity and effect, if any, of a notice of levy served upon him in his fiduciary capacity as trustee, purporting to attach all the property, rights to property, moneys, credits and bank deposits in the petitioner's postession and belonging to Thomas W. Doran, one of the beneficiaries of the trust. The pertinent provision of the trust in issue is contained in Article Third of said Will and reads as follows:

"ARTICLE THIRD: 1. This Trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and engine whatever part or all of the new income or principal (even to the point of anhaustion thereof), or both, thereof he shall deem processor in order to provide comfortable support, maintenance and/or education (at any level) to the individual mergins of the said family

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group. My Trustee shell not feel bound, in making such payments uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group."

[1] The initial issue confronting this court is whether this court has jurisdiction to vacate, cancel or discharge the levy served on the trustee by the Internal Revenue Service. The law is well settled that the United States in filing a proof of claim in a probate proceeding, implicitly consents to the jurisdiction of the probate court to determine the validity of its claim. The levy filed in the instant matter, however, is not concerned with proceedings pertaining to the judicial settlement of the Last Will and Testament of Margaret C. Duncan, but rather concerns the property rights, if any, of Thomas W. Doran, one of the possible beneficiaries of the trust.

[2] The affirmative act of filing a proof of claim invokes the jurisdiction of the Surrogate Court to direct the distribution of estate assets in accordance therewith. The cases cited and relied upon by the petitioner concern thereselves with the determination of claims by the government in probate proceedings, and not with actions with respect to creditor's rights to a beneficiary's interest thereunder.

[3] A levy served, as in this case, after the conclusion of the probate proceedings, effects an administrative seizure of assets and no authority of any court is necessary to give weight or legitimacy to its effect. U. S. v. Eiland, 223 P.2d 118 (Fourth Circuit 1955). The United States Congress has provided an adequate remedy by an aggrieved party to attack a levy which is claimed to be wrongfully asserted. Sec. 7426(a) of the Internal Revenue Code of 1954 provides petitioner with this remedy. Judicial interpretation of this section indicates that this remedy is to be pursued only in the Federal District Court. To decide that this court has jurisdiction or power to determine this issue would exceed its powers and jurisdiction conferred upon it by the New York State constitution and statutes enacted therein.

[4] This court therefore finds that it does not have the authority or jurisdiction, to vacate, annel, cancel or discharge the levy served upon the trustee. It is noted that the petitioner has in fact commenced a proceeding pursuant to the provisions of Section 7425(a) of the Int.Rev.Code in the Federal District Court for the Western District of New York for relief.

Although this court is without jurisdiction and power to determine the validity of the levy, it maintains jurisdiction and over the Last Will and Testament of the decest of and the construction and effect of any provisions of said Last Will are Testament. The question which must be decided is whether the test templiciaries have any property rights in the trust which was created. In Article Trial of said Last Will are Testament.

Under the New York law an express trust vests in the trustee the legal estate subject only to the execution of the trust and the teneficiary does not take any legal estate in the property. E.P.T.L. 7-2.1(a).

[5] The nature of a beneficiary's interest in property subject to a trust is an equitable interest only with the right to enforce the trust provisions pursuant to its terms. Van Cott v. Prentice, 104 N.Y. 45, 10 N.E. 257.

According to the terms of the instant trust instrument, the beneficiaries collectively designated as a family group, of which Thomas W. Doran is a member, was created for providing comfortable support, maintenance and/or education to any one or more of the members of said family group. The trustee has complete and sole discretion pursuant to the terms of the trust to apply and expend the income or principal for the support of any one or all of the members of said family group. The trustee is further authorized not to observe any rule or precept of equality as between the members of said family group.

[6-8] It is clearly the law that where a trustee in administering the trust is given absolute discretion as to the application of income or principal to one or more of a group of beneficiaries without being bound to observe any rule or precept of equality, that the beneficiaries have no absolute right to receive income from the trust, their gift being "only of so much as the trustee shall properly determine to apply". Matter of Connolly, 71 Misc. 388, 389, 130 N.Y.S. 194, 195; Hamilton v. Drogo, 241 N.Y. 401, 150 N.E. 496. It is also established that where you have a discretionary trust, a creditor of one of the beneficiaries cannot compel the trustee to pay any part of the income or principal to the beneficiary. Wetmore v. Truslow, 51 N.Y. 388; Myers v. Russell, 60 Misc. 617, 112 N.Y.S. 520; 2 Scott on Trusts. 3rd Ed., Sec. 155. The creditor, in this case the United States Government, cannot compel the trustee to make a payment pursuant to the terms of the trust where the beneficiary, individually, could not compel the trustee to make such a payment.

Where the discretion is conferred upon a trustee, the courts will not interfere with the exercise of its discretion. Matter of Emmons, 165 Misc. 192, 300 N.Y.S. 580; Matter of Littman, 165 Misc. 285, 200 N.Y.S. 393.

The only interest of Thomas W. Doran and the other beneficiaries of the trust is morely one of expectancy, and the trustee counct be compelled to transfer to any member any part of the trust property. Morrow v. Apple, 58 App.D.C. 171, 25 F.2d 543. Morrow v. Apple hald that since beneficiary had not absolute right to either income or principal, neither was within the reach of the beneficiary's conditions.

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A TO THE PARTY OF THE PARTY OF THE PARTY OF THE

It is the decision of this court that the beneficiaries of the trust created under the Last Will and Testament of Margaret C. Doncars have no absolute right to receive income or principal from the trust and that therefore there is no property or rights to property belonging to the beneficiaries, specifically Thomas W. Doran, the subject of the levy. If, however, the trustee does at any time elect in his discretion to pay to Thomas W. Doran any of the income or principal of the trust, the amount of said payment will be subject to the levy unless the levy has been removed or vacated by the Federal District Court.



46 A.D.2d 334

Carol BRODSKY, as Executrix of the Estate of George Brodsky. Plaintiff. Respondent, v. Frank BANNON and Murray Neckman doing business under the firm name and style of Oakdale Home Village, Defendant-

Supreme Court, Appellate Division, First Department Dec. 30, 1974.

The widow of a deceased partner sought liquidation of partnership assets and appointment of a receiver. Defendants, surviving partners, counterclaimed for specific performance of an option to purchase. The Supreme Court, New York County, Peter A. Quinn, J., granted a summary judgment to the widow and, by Edward J. Greenfield, J., dismissed the surviving partners' counterclaim. The surviving partners appealed. The Supreme Court, Appellate Division. Steuer, J., held that where the surviving partners tendered to the widow what was due for the purchase of decedent's interest according to the partnership agreement but the widow refused and sought liquidation and appointment of a receiver, and the principal asset of the partnership thereafter became practically valueless, and the widow then sought performance which the surviving partners had sought and which she had theretofore refused, equity required that value of the decedent's share be calculated as of the date of the widow's acceptance.

Judgment for widow reversed and vacated; judgment dismissing counterclaim affirmed and matter remanded.

Capozzoli, J., dissented and filed opinion in which McGivern, P. J. joined.

1. Judgment c⇒533

Court's decree in equity speaks as of time of judgment.

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June 19, 1975

Hon. John T. Curtin Chief Judge Western District of New York 624 U. S. Court House Buffalo, New York 14202

Re: In the Matter of the Petition of Samuel D. Magavern, etc., v. United States
Civil: 74-405

Dear Judge Curtin:

An examination of the records of the Erie County Surrogate's Court and conversation with James Murphy, Surrogate Regan's stenographer, discloses the following: Roger P. Williams, Esq., first appeared in the referenced proceedings on July 24, 1974, and at that time filed his affidavit, which raised the question of jurisdiction over the United States, whereupon Surrogate Regan adjourned the proceeding at the request of the government, to September 9, 1974, for the purpose of filing with the Court, memorandums of law on the question of jurisdiction of the Court over the United States.

Mr. Murphy has advised the undersigned that he made no stenographic notes with regard to the proceedings on July 24,1974.

On September 9, 1974, your petitioner appeared on behalf of the Estate; however, no appearance was made by the U.S. Attorney, whereupon Surrogate Regan adjourned the matter until September 25, 1974, for the pulpose of giving the U.S. Attorney an opportunity to present a replying memorandum.

Hon. John T. Curtin Page 2.

5/1.9/75

See Surrogate Regan's letter, dated September 9, 1974, attached hereto.

On September 25, 1974, the United States filed with the Surrogate, its' memorandum of law on the question of jurisdiction. Thereafter the Surrogate determined that the Court had jurisdiction.

If there are any questions in this regard, please do not hesitate to contact the undersigned.

Very truly yours,

MACAVERY, MAGAVERY, LONE & BEILINECH

By:

Charles B. Draper

CED/ch Encl.

CC: Roger P. Williams, Esq.
Office of the U.S. Attorney
Western District of New York
U. S. Court House
Buffall, New York 14202

Lounty of Eric Lurrogate's Office Buffalo, N.Y. 14202 William J. Regan, Surregate Front I. Same, Chief Clerk George F. Engler, Deputy Chaf Clerk September 9, 1974 Magavern, Magavern, Lowe & Beilewech 900 Prudential Building Buffalo, NY 14202 Margaret C. Duncan Estate File No. D-6044 Gentlemen: The above estate proceeding was returnable in this Court this morning. Sam Magavern and Charles' Draper appeared in behalf of the estate. No appearance was made by the U. S. Attorney. The Court, ofcourse, had been apprised by letter of September 5, 1974, that no appearance would be made by reason of the claim of the U. S. Attorney that this Court lacks jurisdiction herein. A memorandum of law has been submitted by the petitioners. Decision has accordingly been reserved with respect to their claim. I will delay making any decision in this matter before September 25, 1974, for the purpose of giving the U. S. Attorney an opportunity to present a replying memorandum if he desires. Mr. Draper has informed the Court that a copy of the petitioners memorandum is being forwarded to the U.S. Attorney on this date. In the event a reply memorandum is not received from the U.S. Attorney by the aforesaid date of September 25th, 1 will then presume that the U.S. Attorney does not intend to file such and will proceed to decide this matter without benefit of same. Very truly yours, WJ Rep. William J. Regan Judge of the Surrogate's Court WJR/JAS/mh CO: John T. Elfvin, U.S. Attorney

SAMUEL D. MAGAVERN, as Executor and Trustee of the Last Will and Testament of MARGARET C. DUNCAN, Deceased,

CIVIL ACTION NO. 74-405

Plaintiff

v.

NOTICE OF MOTION

UNITED STATES OF AMERICA,

Defendant

PLEASE TAKE NOTICE, that upon the annexed affidavit and memorandum in support thereof, the United States of America will move this Court on the 19th day of May, 1975 at 10:00 A.M. for partial summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, and for such other and further relief as to the Court may seem just and proper.

DATED: Buffalo, New York, May 16, 1975.

RICHARD J. ARCARA
United States Attorney
Western District of New York
Office and Post Office Address
502 United States Courthouse
Buffalo, New York 14202

By:

ROGER P. WILLIAMS
Assistant United States Attorney

TO: MAGAVERN, MAGAVERN, LOWE & BEILEWECH Attorneys at Law 20 Cathedral Park Buffalo, New York 14202

SAMUEL D. MAGAVERN, As Executor and Trustee of the Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. 74-405

MEMORANDUM BY THE UNITED STATES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT BY THE UNITED STATES

United States of America, by its attorney, Richard J.

Acara, United States Attorney for the Western District of New
York, files this Memorandum in Opposition to Plaintiff's Motion
for Summary Judgment and in Support of a Cross-Motion by the
United States for Partial Summary Judgment on the grounds that
there are no genuine issues as to any material facts and that
defendant, United States of America is entitled to judgment as
a matter of law pursuant to Rule 56(b) Federal Rules of Civil
Procedure.

STATEMENT

This suit was brought under Internal Revenue Code of 1954 §7426(a)(1) [hereinafter referred to as Code], and seeks the cancellation of a notice of levy served upon the plaintiff by a representative of the District Director of Internal Revenue at Buffalo, New York, and an injunction against the enforcement of said levy by the District Director.

The taxpayer, Thomas W. Doran, was the son of Margaret C. Duncan, deceased. Thomas W. Doran died subsequent to the commencement of this action. During 1964, Margaret C. Duncan executed a will (a copy of which was attached to the Complaint herein) in which the residue of her estate, under "Article Third" thereof, was left

33.

'IN TRUST, NEVERTHELESS, for the following uses and upon the following terms and conditions:

1. This trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATHEW DUNCAH, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the net income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound, in making such payments, uses, applications or expenditures to observe any rule or precept of equality as between the individual members of said family group. . . "

The executor and trustee under the will of Margaret C.

Duncan is Samuel D. Magavern, the plaintiff in this action.

He has distributed the following amounts to the taxpayer under the terms of the trust, in the years indicated:

1968	\$1,500.00
1969	\$2,000.00
1970	\$1,039.61
1971	.\$3,000.00
1/1/72-10/31/72	\$2,000.00
11/1/72-10/31/73	\$3,500.00

During the period from November 1, 1972 to October 31, 1973, the following amounts were, according to the trustee's accounting, distributed:

Thomas W. Doran	\$3,500.00
Catherine Graber	\$2,000.00
Ann Wechter	\$1,000.00
Peter W. Doran	\$2,265.00

Evidently, the distributions are made from time to time according to whether the trustee feels that a particular beneficiary "needs the money."

On December 5, 1973, a Revenue Officer served a notice of levy on the executor and trustee, in an attempt to satisfy the unpaid tax liabilities of Thomas W. Doran from his interest in the above trust. The trustee, however, refused to honor the levy on the grounds that, under the terms of the trust, no monies were due and owing to Thomas W. Doran at the time of service of the levy. See Code \$6331(a). Thereafter, the office of the Regional Counsel, North-Atlantic Region, Internal Revenue Service, at Buffalo, corresponded with the trustee, setting forth the Government's position in essentially the same manner as it is set forth below. The trustee, desiring to litigate the matter, obtained an Order to Show Cause, in the Surrogate's Court of Erie County, New York, why the Internal Revenue Service's levy should not be vacated, cancelled and discharged. The Regional Counsel then advised the trustee that it was the Government's position that the Surrogate lacked jurisdiction over the United States, and suggested that the proper remedy for the trustee was to bring a wrongful levy action in District Court under Code §7426(a)(1).

The trustee at first refused to bring such an action, stating that he desired to contest the matter of jurisdiction in the Surrogate's Court. Later, within the nine month limitation period pertaining to wrongful levy actions under Code §6523(c), the trustee brought this action, and continued the proceeding in the Surrogate's Court.

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The United States filed its Answer and Counterclaim herein. In the proceeding in the Erie County Surrogate's Court, the United States Attorney appeared specially and filed a Memorandum in Opposition to jurisdiction over the United States. On December 27, 1974, the Surrogate filed a decision holding that he lacked jurisdiction over the United States, but went on to treat the matter as an exparte Will construction proceeding, and ruled that the taxpayer had no rights in property of the trust which could be reached by a levy by the Internal Revenue Service under Code \$6331. Thomas W. Doran died on February 19, 1975. The plaintiff-trustee then moved for summary judgment. Since it appears that no material facts are in dispute in this case, the Government cross-moves for summary judgment under Federal Rules of Civil Procedure 56(b).

ARGUMENT

TAXPAYER POSSESSED A LEGALLY ENFORCEABLE RIGHT TO INCOME AND CORPUS OF THE TRUST TO WHICH FEDERAL TAX LIENS ATTACHED

The underlying question raised by this case is whether, and to what extent, the taxpayer, Thomas W. Doran, had a legally enforceable right in the income and corpus of the trust in question, to which federal tax liens arising out of assessments against him can attach, and which may be reached by administrative levy. See Code §6321, 6331. That question forms the basis of the trustee's initial refusal to honor the Government's levy, the basis of his proceeding in the Surrogate's Court, and the basis of his assertion, in this case, that the levy was wrongful.

In the Affidavit filed in support of the plaintiff's Motion for Summary Judgment it appears to be the plaintiff's position that the Surrogate's decision is conclusive with respect to the question of the existence of any property or rights to property of the taxpayer in the trust assets for purposes of Code §§6321 and 6331.)

While the Government agrees that the above question is one of state law, Aquilino v. United States, 363 U.S. 509 (1960), it objects to the plaintiff's legal conclusion that the Government can be bound by a decision rendered ex parte by a Court which ruled in the body of the decision itself that it lacked jurisdiction over the United States. See also Commissioner v. Bosch, 387 U.S.— 456 (1967). The fact of the matter is that the Surrogate was never exposed to the Government's arguments on the merits, since the sole purpose of the United States Attorney's appearance in Surrogate's Court was to contest jurisdiction.

On the dates of assessment noted on the Affidavit of the District Director as to the levy and the unpaid tax liabilities, the Internal Revenue Service obtained liens upon all of the property and rights to property then owned or thereafter acquired by the taxpayer during the lifespan of the lien. Code §6321, 6322. In order to determine whether, and to what extent, the taxpayer has rights in particular property, it is state law that will control. Aquilino v. United States, supra. Unfortunately, the particular question raised by this case has, evidently, not been considered by any New York Court.

while it appears that the language of Article Third (1) of the will vests a large amount of discretion in the trustees, it is the Government's position that the mandatory nature of the words "My Trustee shall pay over or use" when combined with the testatrix' expressed intent that the trust income and assets be used for the "comfortable support, maintenance and/or education" of the beneficiaries, shows clearly that the taxpayer has a right under New York law, to have amounts determined by the trustee paid over to him for the purposes outlined in the trust.

First, it is clear, under New York law, that under the terms of the Duncan will, the trustee would be guilty of an abuse of discretion if he were to pay over to a beneficiary less than a reasonable person would think "proper or necessary." <u>Ireland v. Ireland</u>, 84 N.Y. 321 (1881). <u>Matter of Freeman</u>, 40 N.Y. Misc. 851, 243 N.Y. Supp. 2d 973 (1963).

Second, it is equally clear under New York law, that the beneficiary in such a case would have a cause to action against the trustee, and that a Court could either order the trustee to exercise his discretion or take it upon itself to fix reasonable amounts and order them distributed. In Collister v. Fassitt, 163 N.Y. 281, 57 N.E. 490 (1900), for example, the trustee was empowered to use so much of the property in trust for the support and benefit of the trustor's niece as the trustee should, from time to time, "think best." Evidently, the trustee at first paid very small sums to the beneficiary and finally ceased to make payments altogether. The Court held that the beneficiary had an enforceable right in the trust property, and ascertained the amount of, and ordered the payment of, a reasonable sum for the beneficiary's support. See also, In re Wieman's Will, 165 N.Y. Misc. 2d 60, 300 N.Y. Supp. 72 (1937); In re Allen's Estate, 192 N.Y. Misc. 8, 82 N.Y. Supp. 2d 828 (1948); In re Hayden's Estate, 199 N.Y. Misc. 1097, 105 N.Y. Supp. 2d 708 (1951).

- 7 -

In this regard, it should be noted that a distinction is drawn by the Courts between rights to property which are truly contingent and those in which enjoyment is merely postponed to some future date. In United States v. Long Island Drug Co., 115 F. 2d 983 (2d Cir. 1940), the Court drew such a distinction, pointing out that while future salary payments were contingent upon performance of a contract of service and represented no existing property rights, the equitable life estate of a beneficiary of a trust represented a fixed right to realize property or income derived therefrom, dependant upon no future performance. 115 F. 2d at 936, citing Matter of Rosenberg's Will, 269 N.Y. 247, 199 N.E. 206 (1935), and United States v. Canfield, 29 F. Supp. 734 (S.D. Cal. 1939).

The defendant therefore believes that the New York authorities discussed above support the proposition that, at the time of the levy, Thomas W. Doran had a fixed and determinable right in the income and corpus of the trust created under the Duncan will, and that said right was subject to levy under Code §6331.

It also believes, however, that the amount of that property right is limited to sums determined by the trustee to be payable to or for the use of the taxpayer in the reasonable exercise of his discretion. Sand v. Beach, 270 N.Y. 281, 200 N.E. 821 (1936). Hamilton v. Drogo, 241 N.Y. 401, 150 N.E. 496 (1926).

In United States v. Taylor, 254 F. Supp. 752 (N.D. Cal. 1966), a case involving a levy on a trust for support with spendthrift and forfeiture provisions, the Court characterized the issues as, first, whether the federal tax lien can attach to a taxpayer-beneficiary's life interest in a support trust, and second, if the lien does attach thereto, how it may be effectively foreclosed.

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On the first issue, the Court in Taylor found that the wording of the trust instrument, which was very similar to that in the Duncan will, 25% F. Supp. at 755 n.l, gave the taxpayer-beneficiary a "lifetime, enforceable, equitable right to support from the income of the trust." The Court went on to note that the provision that the "trustee shall pay" was mandatory, and that the discretion of the trustee was limited to a determination of the amount deemed necessary for the taxpayers care, maintenance and support. Furthermore, the Court said, the taxpayer beneficiary's rights in the trust were enforceable under California law (in the same ways in which they are, as is discussed above, enforceable in New York) and the fact that those rights might be variable did not affect the validity of the Government's lien, but only added to the practical problems of enforcing it.

On the second issue, the Court granted the Government's motion for summary judgment foreclosing the tax lien and ordered that further proceedings be held for purposes of determining the appropriate terms of a judgment ordering that the trustees pay over to the Government such sums as might later become payable to the taxpayer-beneficiary.

The defendant herein likewise requests the Court grant its Cross-Motion for Partial Summary Judgment holding that Thomas W. Doran did have a legally enforceable right in the income and corpus of the trust. The sole remaining issue then would be the sum or extent of such right as determined by this Court for pay over to the defendant.

CONCLUSION

The defendant submits that the rationale and the law above are applicable to the case at bar and the Government accordingly is entitled to judgment as a matter of law.

RICHARD J. ARCARA United States Attorney

By:

ROGER P. WILLIAMS
Assistant United States Attorney
502 U. S. Courthouse
Buffalo, New York 14202
(716) 842-3484

WILLIAM R. MORROW, JR. Trial Attorney, ax Division U. S. Department of Justice Washington, D.C. 20530 (202) 739-3335

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. CIV. 74-405

A F F I D A V I T

STATE OF NEW YORK)
COUNTY OF ERIE)

- I, HERBERT B. MOSHER , being duly sworn, state:
- (1) That I am the District Director of Internal Revenue for the District of Buffalo, New York.
- (2) That, acting in my official capacity, I have the official custody of the files and records of the Internal Revenue Service relative to the following taxpayer: Thomas W. Doran.
- (3) That I have caused an examination of the aforementioned records to be made and that the said records reflect the following:
- (a) That on the dates listed below, a delegate of the Secretary of the Treasury made assessments against Thomas W. Doran for unpaid federal income taxes, withholding and FICA taxes, penalties and interest, for the periods listed below, and in the amounts set forth below. Notices of these assessments and demands for payment thereof were duly made upon Thomas W. Doran as follows:

Period	Tax	Metions & Demands	Assessed
1965	Income	10/11/12	\$ 4,673.70 297.45 191.76
1966	Theome	Cf, 19767	9,004.61 197.67 61.70
1969	Income	06/05 ¹ 70	9,30/;.90 36.98 168.65
1970	Income	07/31/71	3,706.05 16.30 7.00 15.79
1st and 2nd Qtr. 1965	Withholding & FICA (1)	12/01/72	1,283.01
2nd Qtr. 1967 thru 4th Qtr. 1968	Withholding & FICA (2)	11/15/72	43,476.19
1st Qtr. 1965 thru 4th Qtr. 1971	Withholding & FICA (3)	12/01/72	40,321.69
		TOTAL	\$112,753.51

- (1) Code Sections 6671(b), 6672, McVey Service Corp.
- (2) Code Sections 6671(b), 6672, Buffalo Consolidated Cartage, Inc.
- (3) Cod tions 6671(b), 6672, Industrial Truck Lines, Inc.
- (4) Code ction 6651(a), Late Filing Fenalty.
- (5) Code Section 6654, Failure to Pay Estimated Tax Penalty.
- (6) Code Section 6651(a), Failure to Pay Tax Penalty.
- (T) Tax Assessed
- (I) Interest Assessed
- (b) That there is presently due the United States from Thomas W. Doran by virtue of the assessments described above, the sum of \$94,376.06 plus lien feed of \$24.00, plus accrued failure to pay paralty of \$1,111.61, plus accrued interest of \$15,072.73 to and including April 15, 1975 for a total of \$110,584.40, Failure to Pay Penalty will continue to accrue on this liability at a daily rate of \$1.40 on or after April 16, 1975. Interest will extinue to accrue on this liability at a daily rate of \$15.42 on or after April 16, 1975 up to June 30, 1975. The daily rate of interest on or after July 1, 1975 will accrue at the daily rate of \$23.13.

(c) That on the date listed below, a delegate of the Secretary of the Treasury served upon Samuel D. Magavern as Executor of the Estate of Margaret C. Duncan, deceased, a Notice of Levy for the tax liabilities of Thomas W. Doran as set forth above, demanding that said Samuel D. Magavern, in his fiduciary capacity, pay over to the Government, all property and rights to property of the said taxpayer then in possession of said Samuel D. Magavern, in his fiduciary capacity, as follows:

DATE OF LEVY

AMOUNT LEVIED UPON SEIZED AND DEMANDED

December 5, 1973

\$ 94,376.06 plus statutory additions

District Director

Internal Revenue Service

Subscribed and sworn to before me this 15th day of Many 1975.

Notary Public

My commission expires

Miniet 30, 1977

WALTER R. PRAYVOZYK
Nov. Filler State of New York
Contain County
Ny Sources will Express Words 30, 1127

Roger P. Williams

RPW:gmc Civ. 74-405

June 11, 1975

Honorable John T. Curtin Chief Judge Western District of New York 624 United States Courthouse Buffalo, New York 14202

Re: In the Matter of the Petition of Semuel D. Magavern, etc. v. United States Civil 74-405

Dear Judge:

In checking the records of the Eric County Surrogate's Court which proceedings are referred to in the papers of Samuel Hagavern, Esq., I have been informed by James Murphy, Surrogate Regan's stenographer that the only appearance made by me in that matter occurred on September 9, 1974; however, he made no stenographic notes with regard to those proceedings.

Therefore, there is no transcript that can be submitted as a result of the proceedings in Erie County Surrogate Court.

Very truly yours,

RICHARD J. ARCARA United States Attorney

By: ROGER P. WILLIAMS
Accistent U. S. Attorney

cc: Alagavern, Magavorn, Loue & Fellewsch Attorneys at Law 900 Prudential Bldg. Buffalo, New York 14802

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff,

-vs-

Civ-74-105

UNITED STATES OF AMERICA,

Defendant.

DECISION and ORDER

CURTIN, DISTRICT JUDGE

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff.

-vs-

Civ-74-405

UNITED STATES OF AMERICA,

Defendant.

APPEARANCES: MAGAVERN, MAGAVERN, LOWE & BEILEWECH (SAMUEL D. MAGAVERN, DSQ. & CHARLES B. DRAPER, ESQ., of Counsel), Buffalo, New York, for Plaintiff.

RICHARD J. ARCAPA, MSQ.
United States Attorney
(ROGER P. WILLIAMS, ESQ., of Counsel)
Buffalo, New York, for the Government.

Margaret C. Duncan, who, when she died in 1965, left the residue of her estate in trust for her husband, her son Thomas W. Doran, and the children and grandchildren of Thomas W. Doran. We are concerned with Thomas W. Doran, the son, who was deficient in his tax payments for various amounts in the years 1965, 1966, 1969, 1969, 1970 and 1971. The Government filed notices of assessment

under 26 U.S.C. \$56201, 6203 at various times from 1967 to 1972 and, on December 5, 1973, the trustee was sorved a notice of levy under 26 U.S.C. 536321, 6331 by the Internal Revenue Service. The levy purported to cover "all property and rights to property . . . belonging to" Thomas W. Doran.

On August 23, 1974, the plaintiff-trustee brought suit under 26 U.S.C. 57426(a)(1), attacking the Government's levy. Presently before the court are the plaintiff's motion for summary judgment in which the plaintiff asks the court to cancel the Government's notice of levy, and the defendant Government's cross-motion for partial summary judgment asking the court to find the tax lien against the trustee valid and that the trustee be ordered to comply with it.

or rights to property of Thomas Doran, and therefore that the levy is wrongful. The Covernment, on the other hand, urges that under the terms of the trust, Mr. Doran has property or rights to property in the trust income and principal, and the trustee, as holder of the property.

was lawfully served with the tax lien. Mr. Doran died February 19, 1975. His tax liability is not contested by the parties.

Both sides agree that the starting point for analysis is Aquilino v. United States, 363 U.S. 509 (1960). In that case, involving the question of the priority of a federal tax lien, the Supreme Court stated:

The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had "property" or "rights to property" to which the tax lien could attach. answering that question, both federal and state courts must look to state law However, once the tax lien has attached to the taxpayer's statecreated interests, we enter the province of federal law, which we have consistently held determines the priority of competing liens asserted against the taxpayer's "property" or "rights to property." 363 U.S. at 512-514 (citations omitted, footnotes omitted).

The plaintiff, prior to instituting this action, commenced an action in Surrogate's Court of Evie County on June 27, 1974, seeking a determination of the question now before this court. The plaintiff claims that the Surrogate's ruling that the trust beneficiaries have no

property rights in the trust, and specifically that Thomas W. Doran has no property rights in the trust, is conclusive of the issue in this case. In re Will of Duncan, 362 N.Y.S.2d 788, 792, 80 Misc.2d 32 (Sur.Ct. Eric Co. 1974). However, the Supreme Court in Commissioner v. Bosch, 337 U.S. 456 (1967), ruled that a federal court is not "conclusively bound by a state trial . court adjudication of property rights or characterization of property interests when the United States is not made a party to such proceeding." 337 U.S. at 456-457. The Court indicated that, as in diversity cases, the federal court must look to the state's highest court as the best authority on that state's law and that, in the absence of a ruling by that court, "proper regard" should be given to the decisions of that state's lower courts. 397 U.S. at 465.

The Government appeared before the Surrogate solely to contest that court's jurisdiction. It did not argue the merits of plaintiff's claim. The Surrogate ruled that he had no jurisdiction over the Government with respect to the tax levy, but that he maintained

jurisdiction over the construction of the Duncan will and could decide "whether the trust beneficiaries have any property rights in the trust." In re Will of Duncan, suora, 362 N.Y.S.2d, at 790.

The plaintiff argues that the Surrogate's will construction binds the Government since the proceeding was in rem, but the cases cited by plaintiff in his brief before the Surrogate and before this court are not clear on this point. If the plaintiff's contention were upheld, then questions of federal tax liability could be routinely and conclusively decided by lower state courts. Such a procedure does not stand up under the guidelines of the Bosch case.

This court agrees with the Government that the will construction was ex parts and not binding on it.

Therefore, although not bound by his ruling, we must consider the conclusions of the Surrogate. No other New York cases appear to be directly on point.

The pertinent part of the trust provision, "ARVICHE THIRD", reads:

1. This Trust shall be held and administered for the benefit of the

family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part or all of the new income or principal (even to the point of exhaustion thereof), or both, thereof he shall deemproper or necessary in order to provide comfortable support, maintenance and/or education (at any level) to the individual members of the said family group. My Trustee shall not feel bound, in making such payments, uses, applications or expenditures, to observe any rule or procept of equality as between the individual members of said family group. (Emphasis added).

The Surrogate ruled that since the trust is discretionary, and since the trustee need not distribute the trust income or principal equally among the beneficiaries, "[t]he only interest of Thomas W. Doran and the other beneficiaries of the trust is merely one of expectancy, and the trustee cannot be compelled to transfer to any member any part of the trust property." In re Will of Duncan, supra, 362 N.Y.S.2d, at 791. According to the Surrogate,

It is clearly the law that where a trustee in administering the trust is given absolute discretion as to the application of income or principal to one or more of a group of beneficiaries without being bound to observe any rule

or precept of equality, that the beneficiaries have no absolute right to receive income from the trust, their gift being "only of so much as the trustee shall properly determine to apply". Natter of Connolly, 71 Misc. 388, 339, 130 N.Y.S. 194, 195[(Sur.Ct. Kings Co. 1911)]; Hamilton v. Drogo, 241 N.Y. 491, 150 N.E. 496 [(1926)]. 362 N.Y.S.2d at 791.

asked the court to order the trustee "to pay him certain income, in order that he may use it in part to reimburse himself for past expenditures in taking care of his children, and in part to provide for their future care and maintenance." Matter of Concolly, supra, 130 N.Y.S. at 195. The Surrogate in that case rejected the guardian's application, ruling that when a trust gives the trustee discretion in determining income distribution, "it is not for either the guardian or the court to interfere with the function of the trustee, unless it appear that he is exercising it perversely or unreasonably." 130 N.Y.S. at 195 (caphasis added). The Surrogate also pointed out that the vill in that case made no provision for support or maintenance, but only for education.

In Droio, the will provided that the trustee use the trust income "for the maintenance and support or

otherwise, for the benefit of all or any one or more exclusively of the other or others of him my said son . . . as my . . . trustees in their sole and uncontrolled discretion . . . think fit." Hamilton v. Drogo, supra, 241 N.Y., at 403 (emphasis added). The crucial word in the terms of this will was "exclusively," and it was the use of this word that gave the trustee the discretion to decide whether or not to pay some trust income or none at all to an individual trust beneficiary. This distinction was pointed out by the New York Court of Appeals in a later case, Sand v. Beach, 270 N.Y. 281 (1936). In Beach, the trustee was given discretion to pay the trust income "either direct and in person to my nephew or for the use and benefit of my said nephew and those dependent upon him, during his lifetime, and in the manner and amounts . . . said trustee . . . in his discretion may deem best . . . " 270 N.Y., at 283.

The New York Court of Appeals ruled in Beach that the use of the word "or" gave the trustee the choice of distributing trust income to either the nephew or the nephew and those dependent upon him. It did not, however,

give the trustee the choice of not giving any trust income to the nephew at all. The court distinguished Drogo, because in Drogo the terms of the trust gave the trustee the discretion to distribute trust income to one or more of the beneficiaries, exclusive of the other beneficiaries.

than to <u>Drogo</u>. The trustee, under the Duncan will, "shall pay over or use" the income or principal "he shall deem proper or necessary in order to provide comfortable support, maintenance . . . to the individual members of the said family group." Therefore, although the trustee is not bound by the will to give equal allotments to each beneficiary, he is bound to distribute some trust income to each of the individual beneficiaries for their "comfortable support." Nothing in the will allows the trustee to delete any beneficiary totally.

In the years directly preceding the Government's levy of December 5, 1973, the trustee distributed the following amounts to Whomas W. Dozan.

1963	\$ 1,500.00
1969	2,000.00
1970	1,039.61
1971	3,000.00
Jan.1, '72 - Oct.31, '72	2,000.00
Nov.1, '72 - Oct.31, '73	3,500.00

Memorandum of Covernment at 2.

Although the courts will not ordinarily interfere with the discretion of the trustee, this rule is not ironclad. If the trustee fails "to honestly and fairly exercise the discretion vested in [him],"

Collister v. Fassitt, 163 N.Y. 231, 292 (1900), then a court will step in, at the beneficiary's beheat, and determine the amount due the beneficiary. In Ireland v.

Ireland, 84 N.Y. 321 (1931), the court interpreted the trust provisions as granting the trustee discretionary power over the income distribution to the various beneficiaries, but stated that a trustee's discretion can be "controlled" by a court of equity. 34 N.Y. at 328.

It appears, then, that even if the trustee is granted discretion over the amount of trust income to be distributed to individual trust beneficiaries, the individual beneficiary of the trust, as long as the trustee is directed to pay some trust income to him, can compel

the trustee to exercise his discretion reasonably. To that extent, the beneficiary has a "right to property" under New York law.

A similar situation confronted a federal district court in the Northern District of California in the case of <u>United States v. Taylor</u>, 254 F.Supp. 752 (N.D.Cal. 1956). The court stated:

The trust being one fundamentally for support, the taxpayer has a basic beneficial right to receive payments from income to the extent needed for his support. It follows that the government liens have attached to and subsist against that right.

254 F. Supp. at 756.

The federal tax lien is pervasive. In referring to the wording of 26 U.S.C. \$6321, the Supreme Court has stated that "[s] tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." Glass City Bank v. United States. 326 U.S. 265, 267 (1945). We conclude that under New York State law, the beneficiary had "rights to property" in that he had a right to a reasonable sum under the settlor's instruction for his "maintenance and care," and that therefore the Covernment's levy is valid. The determination of the

actual amount of trust income and/or principal reached by the levy must await trial.

The trustee's motion for summary judgment is denied; the Government's motion for partial summary judgment declaring the tax lien valid is granted.

So ordered.

JOHN T. CURTTN

United States District Judge

DATED: June 8, 1976

UTITED STATES DESTRICT COURT FOR THE WESTERN DISTRICT OF HEW YORK

SAMULE D. MAGAVERN, as Executor and Trustee of the Last Will and Tratament of MARGARET C. DUNCAN, Deceased

CIVIL ACTION NO. CIV. 74-405

Plaintiff

-V-J-

STIPULATION

UNITED STATES OF AMERICA

Defendant

SIR:

that the amount of money reached by the defendant's lavy is \$2,023.50; and that upon recovery of some from the plaintiff, the defendant's tax lien and lavy will be cancelled and the defendant will forever forbear enforcement of said lien and lavy, or filing further notice of lavy against plaintiff; and that either party hereto may, without notice to the other, submit to this Court an amended order and final judgment, of which the annexed is a copy, for entry pursuant to the terms of this stip lation.

Dated: Buffalo, New York July 12, 1976.

MAGAVERY, MAGAVERY, LOWE, BEILEWECH & DOPKIES
Attorneys for Plaintiff

WHILE STAWES AFFORMER Actorias years Defendant

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At a Term of the United States District Court held in and for the Western District of New York at the City of Buffalo, New York at the Courthouse thereof on the 15th day of July, 1976.

PRESENT: HON.

JOHN T. CURTIN
District Judge

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

SAMUEL D. MAGAVERN, as Executor and Trustee of the Last Will and Testament of MARCARET C. DUNCAN, Deceased

CIVIL ACTION NO. CIV. 74-405

Plaintiff

AMENDED ORDER AND FINAL JUDGMENT

UNITED STATES OF AMERICA

-vs-

Defendant

This cause having come on to be heard on motion of plaintiff for an amended order and final judgment and the Court having considered the pleadings in the action, the plaintiff's motion for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendant's motion for a partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, the affidavits and memoranda of the parties hereto filed herein, the order and decision of this Court entered on June 8, 1976 and the stipulation of the parties dated July 12, 1976, and having found that the parties hereto regard the issues of law involved herein as being of primary importance to both parties and desire to enter into a final judgment herein in order to avoid further unnessary delay and litigation expenses for a trial herein,

and having found that there is no genuine issue to be submitted to trial, it is

ORDERED, that this Court's order, dated June 8, 1976, be and the same hereby is amended by deleting therefrom the sentence:
"The determination of the actual amount of trust income and/or principal reached by the levy must await trial"; and by adding thereto that by stipulation of the parties, dated July 12, 1976, the amount of money reached by defendant's levy is the sum of \$2,305.50, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant recover of plaintiff in its counterclaim the sum of \$2,305.50, and it is further

ORDERED, ADJUDGED AND DECREED, that upon recovery of the sum of \$2,305.50 from the plaintiff, the defendant's tax lien and levy will be deemed cancelled and the defendant will be forever barred from enforcing its levy or filing further notice of levy against the plaintiff.

JOHN T. CURTIN

JOHN T. CURTIN

United States District Judge

ENTER: